

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1483

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-1483

B
PJS

UNITED STATES OF AMERICA,

Appellee,

—v.—

EDMUND A. ROSNER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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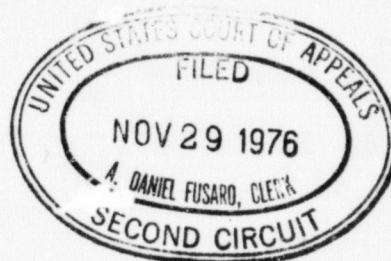


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

-against-

EDMUND A. ROSNER,

Appellant

APPELLANT'S BRIEF

STATEMENT OF THE ISSUES

1.

Must a sentence which was influenced in its
formulation by a p or illegal sentence be set aside.

2.

Must the defendant be resentenced by a
different judge.

STATEMENT OF THE CASE

This is an appeal from an order of the Hon. Inzer B. Wyatt, United States District Judge for the Southern District of New York, entered October 1, 1976, denying defendant Rosner's motion made pursuant to F.R.Cr.P. 35 and 28 U.S.C. §2255, to vacate, set aside or correct the illegal sentence imposed upon him by Judge Wyatt on August 16, 1974 and to reassign the case for resentencing before another judge, together with such other and further relief as may be just in the circumstances.

STATEMENT OF FACTS

This case was tried before the Hon. Arnold Bauman and a jury commencing November 20, 1972. On December 5, 1972, Rosner was convicted of the crimes of conspiracy, 18 U.S.C. §371, obstruction of justice, 18 U.S.C. §§1503, and 2, and of three counts of bribery, 18 U.S.C. §§201(b) and 2, and 3237. He was sentenced by the Hon. Arnold Bauman on March 20, 1973, to a five year term of imprisonment. Thereafter, this Court affirmed the conviction

but remanded for resentencing before another judge. On August 16, 1974, the Hon. Inzer B. Wyatt resentenced Rosner to a term of imprisonment of three years. On September 3, 1976, he denied a motion addressed to his discretion, to reduce the sentence.

This Court remanded for resentencing because the procedure followed on Rosner's initial sentencing was illegal. Judge Bauman in sentencing Rosner considered a memorandum prepared by the United States Attorney's Office which the Probation Department did not screen or verify and which contained accusations of alleged "possible misrepresentations, fraudulent conduct, lying and unethical behavior" on Rosner's part. The memorandum included an accumulation of hearsay, inferences and adverse conclusions of Assistant United States Attorneys. It was conveyed to Judge Bauman ex parte and was retained by him in camera for two months before the sentence; it was shown to defense counsel only on the morning of the sentencing and counsel's timely request for a continuance to contradict the report which Rosner claims was demonstrably false and misleading, was denied. It was the combination of these factors which led this Court to conclude that Rosner's initial sentencing was illegal, requiring a remand for resentencing.

See, United States v. Rosner, 485 F.2d 1213, 1229-31 (2d Cir. 1973), cert denied, 417 U.S. 950 (1974).

At the resentencing, Judge Wyatt explicitly gave weight to Judge Bauman's prior illegal sentence as a factor in formulating the sentence imposed upon Rosner.

Before imposing sentence Judge Wyatt stated:

"I have taken into account, as a factor, Judge Bauman's sentence and I disagree with Mr. Dershowitz's memorandum that no weight whatever can be given to Judge Bauman's sentence.

I believe that Judge Bauman's sentence is one of the many factors to be considered, properly to be considered by me in arriving independently at a sentence now to be imposed.

I consider Judge Bauman one of the ablest judges to have graced this court and I have for him the highest respect..." (A-26-7).*

At the hearing held upon this motion, on October 1, 1976, Judge Wyatt acknowledged in colloquy with Rosner's counsel, that he had given some weight to Judge Bauman's prior illegal sentence, in formulating the sentence he imposed upon Rosner as a result of his respect for Judge Bauman and because Judge Bauman tried the case (A-45).

He declined to adopt the factual assertion⁻ urged by the Government that in sentencing Rosner his remarks were meant to express no more than that he shared Judge Bauman's view of the seriousness of Rosner's offense (A-47-8).

In denying Rosner's motion to set aside the sentence, Judge Wyatt said that he had "no sympathy for it whatever"...."it is just part of the same game. It is a ploy," (A-43-4). "The motion is without merit and is denied....it just affronts common sense in my opinion.

*Numbers in parentheses refer to pages in Appellant's Appendix.

That's why I say it is without merit." (A- 45).

ARGUMENT

POINT I

A SENTENCE WHICH WAS INFLUENCED IN ITS FORMULATION BY A PRIOR ILLEGAL SENTENCE MUST BE SET ASIDE AND THE DEFENDANT RESENTENCED BY A DIFFERENT JUDGE.

Although generally, a sentencing judge has very broad discretion in imposing any sentence, which is within statutory limits, Dorzynski v. United States, 418 U.S. 424 (1974); his discretion is not unlimited.

A judge in exercising his discretion may not rely, even in part, upon misinformation, such as an inaccurate criminal record, Townsend v. Burke, 334 U.S. 736 (1948); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970); See also, United States v. Rosner, 485 F.2d 1213, 1229-31 (2d Cir. 1973), cert denied 417 U.S. 950 (1974); United States v. Robin, ___ F.2d ___ (2d Cir. Oct. 15, 1976), Slip Op. 5829-5846, United States v. Stein, ___ F.2d ___ (2d Cir. Oct. 22, 1976), Slip Op. 211-228; nor be influenced, even to some extent, by an illegal conviction, United States v. Tucker, 404 U.S. 443 (1972); McGee v. United States, 462 F.2d 243 (2d Cir. 1972); United States v. Rivera, 521 F.2d 125, 129 (2d Cir. 1975). Thus in United States v. Tucker, supra, the Court affirmed an

appellate order vacating a sentence which was imposed after the sentencing judge gave specific consideration to two prior convictions obtained in violation of the accused's constitutional right to counsel in light of Gideon v. Wainwright, 372 U.S. 335 (1963). Similarly, in McGee v. United States, supra, this Court vacated a sentence and remanded for resentencing a defendant convicted on four counts of violating the Selective Service Act of 1967, which were prosecuted in one trial and upon which identical concurrent sentences were imposed, where a conviction under one of the counts was determined to have been unlawful and it was not improbable that the sentencing process with respect to the valid counts was to some extent affected by the conviction on the count which was illegally brought. See also, United States v. Rivera, supra.

In Farrow v. United States, ___ F.2d ___, 20 Cr.L. 2121 (9th Cir. Sept. 24, 1976), it was held that unless the sentencing judges non-consideration of the defendant's prior illegal convictions appears conclusively from the record, his consideration should be presumed. Here, Judge Wyatt's consideration of Rosner's prior illegal sentence is established conclusively in the record (A-26-7,45).

A motion made to set aside an illegal sentence either under Rule 35 or 28 U.S.C. §2255 may be made at any time

and is a matter within the District Court's jurisdiction.
United States v. Stein, supra, Slip Op. at 223, N.7.

In this case Judge Wyatt acknowledged on the record, that one of the factors which contributed to the formulation of the three year sentence he imposed upon Rosner, was Judge Bauman's prior illegal sentence, (A-26-7,45) which was vacated by this Court because it was influenced by the prosecutor's adversary memorandum which contained alleged misinformation which the defendant was denied an opportunity to contradict. Therefore, the sentence imposed by Judge Wyatt is admittedly, at least in part, the fruit of the poisonous tree. Consequently, it must be set aside and the defendant re-sentenced.*

The resentencing should be done by another judge.

This court said in vacating the sentence imposed by Judge Bauman:

"The resentencing should be done by another judge. On the facts of this case we adopt the rationale of the First Circuit, [i]t is difficult for a judge, having once made up his mind, to resentence a defendant, and both for the judge's sake, and the appearance of justice, we remand this case to be redrawn." See Mawson v. United States, 463 F.2d 29 (1st Cir. 1972).

United States v. Rosner, supra, at 1231. See also, United States v. Brown, 470 F.2d 285,288-9 (2d Cir. 1972); United States v. Robin, supra, Slip Op. at 5841; United States v. Stein, supra, Slip Op. at 227; compare, Farrow v. United

*That Rosner was prejudiced by Judge Wyatt's consideration of Judge Bauman's prior illegal sentence maybe inferred from Judge Wyatt's disregard of the mean sentence of less than two years, typically imposed in cases similar to Rosner's (A-54-64).

States, supra, (motions to invalidate a sentence under United States v. Tucker, should generally be heard by a judge other than the one who imposed the original sentence).

In light of the pejorative comments made by Judge Wyatt both in denying Rosner's motion to vacate his sentence and in earlier proceedings had before him, see, transcript of proceedings on August 26, 1976 and September 3, 1976, this rationale applies here with unusual force.

CONCLUSION

The sentence imposed upon Rosner by Judge Wyatt is illegal because Judge Wyatt was influenced in its formulation by Judge Bauman's prior illegal sentence. Therefore, Judge Wyatt's sentence must be vacated and Rosner must be resentenced by a different judge.

Respectfully submitted,

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